programmers different rates.[120] However, in addition to the necessity of including all channels on the relevant tier(s) in an average implicit fee calculation, we believe that requiring cable operators to base an implicit fee calculation only on unaffiliated programming may inappropriately result in different maximum leased access rates for systems that are identical but for their affiliation with certain programmers. We believe that adopting a standard similar to that adopted with regard to our affiliate transaction rules will resolve this disparity without interfering with the operator's right to establish different rates for affiliated and unaffiliated programmers.[121] We will therefore modify our rules to require that, in calculating the average implicit fee, operators must use programming costs for affiliated programming that reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the programming should be priced at the lower of the programmer's cost or the fair market value. Because these objective measurements are based on factors outside affiliated transactions, the requirement to use them as proxies for the actual programming costs does not conflict with our conclusion in the *Rate Order* that the Commission is precluded from establishing rates based on transactions with affiliates.[122]

49. Finally, we believe that it is appropriate to eliminate our current programmer categories for determining maximum rates for leased access programming that is carried on a tier. In the *Rate Order*, the Commission stated that the programmer categories were intended to reflect the different economies faced by the different types of programmers. We now believe, however, that basing maximum rates on the average value of the channel capacity is a more appropriate approach to implementing Section 612 than making distinctions based on the different economies among leased access programmers. For this reason, and also because an average implicit fee calculation must include all channels on the relevant tier(s), we will abolish the mandatory distinction between the rate charged to direct sales programmers and "all others."[123] Therefore, all leased access programmers carried on a cable system's tier will be subject to the same maximum rate, which will be derived using all channels on the relevant tier(s), including channels devoted to direct sales programming (e.g., home shopping networks and infomercials). As described below in Section II.B.2.d, cable operators will still be required to calculate different rates for programming services sold on a per-channel, or a la carte, basis. We will maintain the distinction between leased access programming carried on a tier and leased access programming offered as an a la carte service, not because of their "different economies," but because of the

[120] *Rate Order*, 8 FCC Rcd at 5943 n.1294.

[121] *See Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking* in MM Docket No. 93-215/CS Docket No. 94-28, 11 FCC Rcd 2220, 2277-2278 (1995).

[122] *Rate Order*, 8 FCC Rcd at 5943 n.1294.

[123] A few commenters argue that maintaining a separate category for direct sales programming would prevent home shopping networks and infomercial programmers, which can afford higher rates, from dominating leased access capacity. *See* Telemiami Comments at 13-14; Telemiami Reply at 22-23; VIPNA Comments at 10-11; VIPNA Reply at 5; Adelphia, et al. Comments at 18.

practical differences involved in implementing a maximum leased access rate for a la carte services.

d. Maximum Rate for Full-Time Leased Access Programming Carried as an A La Carte Service

50. Despite our conclusion that the average implicit fee formula is the appropriate method for setting maximum reasonable rates for leased access programming carried on a tier, we conclude that the highest implicit fee formula remains the best approach for setting maximum reasonable rates for leased access programming offered to subscribers as an a la carte service. Because the subscriber revenue for an a la carte service is known, an a la carte programmer can readily determine how much it is implicitly paying the operator for carriage. If an unaffiliated a la carte programmer is implicitly paying more than the maximum leased access rate for carriage, the a la carte programmer could obtain a larger share of the subscriber revenue simply by demanding a lease. This potential disruption to operators' negotiated relationships with unaffiliated a la carte programmers could adversely impact the operation, financial condition, and market development of cable systems.[124] The highest implicit fee for a la carte services protects operators from this potential adverse effect because, unlike the average implicit fee, it represents the maximum amount that any a la carte programmer is implicitly paying for carriage. The average implicit fee does not pose such a risk for tiered services because the actual subscriber revenue for individual channels is not known. Even if the actual subscriber revenue for a particular tiered service could be determined, a non-leased access programmer implicitly paying more than the average implicit fee would have little reason to switch to leased access because subscriber revenue is not passed through to leased access programmers that are carried on a tier. Non-leased access programmers that are carried on a tier are unlikely to switch from an arrangement where they receive a license fee to an arrangement where they pay the cable operator but receive no subscriber revenue.

51. In addition, because in the a la carte context we are able to determine the actual subscriber revenue derived from particular programming services, we do not need to use the average implicit fee formula. Moreover, there can be no "double recovery" in the a la carte context because any subscriber revenues for a leased access channel carried as an a la carte service are readily ascertainable and can be passed through to the leased access programmer.[125] In order to protect against any over recovery, we will modify our rules to clarify that any subscriber revenue from an a la carte leased access service must be passed through to the leased access programmer. As with the average implicit fee, we will require operators to include affiliated a la carte services in their highest implicit fee calculation using the rules described

[124] *See* Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

[125] *See* NCTA Comments at 23 n.61 (there is no issue of double recovery with respect to the highest implicit fee formula for a la carte services); Cox Comments at 5 (operators do not retain the subscriber revenues for leased access channels carried on an a la carte basis).

above for determining programming costs for affiliated programming.[126] As discussed below in Section III.A.2, we will also make one modification regarding the calculation of the highest implicit fee for a la carte programming services.

e. Proposals for a Flat Rate

52. We received a broad range of proposals from commenters suggesting that the maximum leased access rate should be a flat rate. Based on its cost of service, Continental suggests a maximum monthly flat rate per subscriber of $0.87 to $0.89.[127] Adelphia, et al. propose a minimum $1.00 monthly per subscriber rate for channel capacity on small systems to account for their higher air time costs relative to larger systems.[128] Paradise claims that a per subscriber monthly rate of $0.30 would be a reasonable maximum rate that would avoid complex accounting disputes and costly arbitration and litigation.[129] By contrast, we received several proposals for a lower monthly per subscriber flat rate from ValueVision ($0.10), Telemiami ($0.01 to $0.05), Blab TV ($0.04 to $0.08), CBA ($0.03) and Broadcasting Systems ($0.0025 to $0.03, depending on channel location).[130]

53. The attractiveness of a flat rate is its simplicity. After carefully considering each proposal for a flat rate, however, it is clear that the fundamental limitation with a flat rate approach is selecting a maximum rate that is appropriate for all cable systems. None of the commenters provided sufficient empirical evidence demonstrating how their proposed flat rate would promote the statutory objectives of diversity and competition, while also guarding against an adverse effect on cable systems' operation, financial condition, and market development.[131] We therefore decline to adopt a flat rate approach.

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[126] *See* Section II.B.2.c. (The inclusion of affiliated programming will prevent the occurrence of different maximum rates for essentially identical cable systems.).

[127] *See* Continental Comments at 23; Continental Reply at 4.

[128] *See* Adelphia, et al. Comments at 19.

[129] *See* Paradise Reply at 1-2.

[130] *See* ValueVision Reply at 25-26; Telemiami Comments at 19-20; Blab TV Comments at 6-7; Blab TV Reply at 8; CBA Comments at 3; Broadcasting Systems Comments at 2. Several of these commenters argue that a higher rate should only be allowed if a cable operator can demonstrate that the maximum rate would not cover its costs. *See* ValueVision Reply at 26; Telemiami Comments at 19-20; Blab TV Comments at 6-7, Blab TV Reply at 8-9.

[131] Several commenters argue that leased access programmers provided no bases to support their proposed flat rates. *See, e.g.*, NCTA Reply at 10-11; TCI Reply at 7; SCBA Reply at 3; Time Warner Reply at 12.

f. Transition Period

(1) Background

54. In the *Further Notice*, we asked whether operators should be required to implement the proposed cost/market rate formula immediately or whether a transition period would be appropriate.[132] At that time, we noted that when non-leased access programming is placed on a channel designated for leased access, the operator and the programmer generally assume the risk that the programming may have to be displaced for a leased access programmer. We were concerned, however, that the Commission's immediate adoption of an entirely new formula might unduly penalize operators and programmers for decisions to use designated channels for non-leased access programming, when those decisions had been based on conditions created by the Commission's rules. We also wished to avoid any abrupt and unnecessary disruption to subscribers due to changes in programming line-ups.

55. In the *Further Notice*, we tentatively concluded that the appropriateness of a transition period should depend on whether a cable system had any unused channel capacity (i.e., dark channels).[133] We tentatively concluded that a transition period would not be appropriate for: (a) programmers already leasing channel capacity on a cable system and (b) programmers seeking leased access on a cable system with unused channel capacity. On the other hand, if the operator would be forced to bump existing programming to accommodate a leased access request, we sought comment on whether transition relief might be appropriate. We asked commenters to explain how any proposed transition period would be consistent with the Commission's obligation to establish maximum reasonable rates for leased access.

(2) Discussion

56. We received numerous proposals regarding an appropriate transition mechanism, including: no transition period;[134] a multi-year transition period;[135] a transition period that

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[132] *Further Notice* at paras. 98-99.

[133] *Id.*

[134] *See* Adirondack Comments at 4; Asiavision Comments at 2; Beach TV Comments at 2; CBA Comments at 10; CME, et al. Comments at 30; Game Show Network Comments at 15-18; Game Show Network Reply at 19-20; RK Production Comments at 11; Erwin Scala Comments at 3; Sherjan Comments at 3; Telemiami Comments at 15; ValueVision Comments at 16-22; ValueVision Reply at 26-28; VIPNA Comments at 13-14; VIPNA Reply at 7; WBGN-TV Comments at 2-3.

[135] *See, e.g.,* Visual Media Comments at 8 and Disney Reply at 6-7 (three-year transition); Daniels, et al. Reply at 13 (four-year transition); E!, et al. Comments at 7, Buckeye Comments at 9-10, and Lifetime Reply at 7 (five-year transition); E!, et al. Reply at 6-7 (three to five year transition); Discovery Comments at 13-14 (five-year transition if leased access programming duplicates programming already on the system); Outdoor Life, et al. Reply at 8-15 (six-year transition); Faith & Values Reply at 8, Liberty Sports Comments at 6-7, Liberty Sports Reply at 6-7,

coincides with the expansion of channel capacity;[136] a transition period that permits the cable operator to continue to charge the highest implicit fee if existing programming is bumped;[137] and a transition period that prohibits bumping except upon expiration of the incumbent non-leased access programmers' contracts.[138]

57. After careful consideration of the above proposals, we have decided not to adopt a transition mechanism. In the *Rate Order,* the Commission clearly stated that "the rules we adopt should be understood as a starting point that will need refinement both through the rulemaking process and as we address issues on a case-by-case basis."[139] Thus, we agree with commenters that argue that cable operators and non-leased access programmers have had ample notice that the rate formula was subject to change.[140] Both operators and programmers alike understand that a reduction in the maximum rate could increase the demand for leased access, thereby increasing the possibility that bumping might occur.[141]

58. We believe that operators and programmers that negotiate to place non-leased access programming on a channel designated for leased access assume the risk that the programming might have to be bumped for a leased access programmer. Section 612 explicitly provides that operators may no longer use unused leased access capacity once a written agreement is obtained by a leased access programmer.[142] We do not believe that an operator's contractual

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International Channel Comments at 5, SCBA Comments at 24-26, and Tele-Media Comments at 12-15 (multi-year transition).

[136]*See* NCTA Comments at 28; ESPN Comments at 7; A&E, et al. Comments at 15, 58-59; Lifetime Reply at 6; Outdoor Life, et al. Comments at 38; Rainbow Comments at 11-13; Travel Channel Comments at 16-19; Viacom Comments at 9-10.

[137]*See* Adelphia, et al. Comments at 21; Travel Channel Comments at 18-19; Viacom Reply at 5.

[138]*See* Continental Comments at 29-31 (an average of four years before its carriage contracts expire); U S West Comments at 11-13, Encore Comments at 7, MPAA Comments at 7, and Travel Channel Comments at 19-21 (multi-year transition based, in part, on length of programming licensing commitments); Intermedia/Armstrong Comments at 21 (existing leased access contracts should not be revised to account for a new rate method).

[139]*Rate Order*, 8 FCC Rcd at 5936. In addition, the strong possibility that the Commission might change its maximum rate formula was clearly suggested in the *Further Notice*, which was released on March 29, 1996.

[140]*See* Telemiami Comments at 15; VIPNA Comments at 13; Sherjan Comments at 3; ValueVision Comments at 16-17; Game Show Network Comments at 16-17.

[141]*See, e.g.,* NCTA Comments at 2; TCI Comments at i; ESPN Comments at 3; Time Warner Comments at 3; Travel Channel Comments at 6; Outdoor Life, et al. Comments at 2; C-SPAN Reply at 4-5; Discovery Comments at ii.

[142]Communications Act § 612(b)(4), 47 U.S.C. § 532(b)(4).

obligations with non-leased access programmers excuse it from its statutory obligation to accommodate leased access programmers.[143]

C. Part-Time Leased Access Programming and Maximum Part-Time Rates

1. Background

59. Under the Commission's rules, cable operators are required to accommodate part-time leased access requests, but need not accommodate requests of less than one half hour.[144] With respect to rates for part-time leased access programming, the Commission's rules permit cable operators to charge different time-of-day rates, provided that: (a) the total of the rates for a day's schedule (i.e., a 24-hour block) does not exceed the maximum rate for one day of a full-time leased access channel prorated evenly from the monthly rate; (b) the overall pattern of time-of-day rates is otherwise reasonable; and (c) the time-of-day rates are not intended to unreasonably limit leased access use.[145] We stated in the *Reconsideration Order* that this approach recognizes that different time slots have different values. In addition, time-of-day pricing furthers the statutory goal of promoting diverse programming sources because programmers that could not afford rates based on uniform pro rata pricing may be able to afford lower non-prime time rates.[146] Making non-prime time slots less expensive, and therefore more attractive, to programmers may also help promote the maximum use of part-time leased access channels.

60. The *Further Notice* sought comment on a cable operator's obligation to accommodate a part-time leased access programmer by opening a new channel for leased access use, and on the calculation of maximum rates for part-time use. On the issue of accommodation, the *Further Notice* sought comment on whether there is any compelling reason to depart from the rule set forth in *TV-24 Sarasota, Inc. v. Comcast*[147] that a cable operator is not required to open an additional channel for part-time leased access use if the operator can reasonably accommodate

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[143]Several commenters asked the Commission to clarify that compliance with the leased access requirements does not entitle cable operators to abrogate existing programming contracts. *See* ESPN Comments at 8; Discovery Comments at 14; E!, et al. Comments at 6-7; MPAA Comments at 7; Lifetime Comments at 4; Lifetime Reply at 6; Viacom Comments at 6-7; Viacom Reply at 4. We decline to address this issue because it exceeds the scope of this proceeding.

[144]*Reconsideration Order* at para. 47. Two petitions for reconsideration were filed with regard to this rule; these petitions are addressed in Section III.C.

[145]*Id.* at para. 44. In order to ensure that operators' part-time rates do not exceed the maximum rate, operators are required to establish a schedule of rates, or a rate card, for different times of the day.

[146]*Id.*

[147]*TV-24 Sarasota, Inc. v. Comcast*, 10 FCC Rcd 3512, 3518 (Cable Serv. Bur., December 27, 1994).

the leased access request by providing comparable time slots on an existing leased access channel.[148] We tentatively concluded that where an operator cannot reasonably accommodate a request with an existing leased access channel, it should only be required to open an additional leased access channel if the programmer guarantees a minimum time increment of eight hours within a 24-hour period.[149] We also tentatively concluded that this rule should apply even when a dark channel (i.e., activated but without programming) is available.[150]

61. In addition, the *Further Notice* requested comment on whether time-of-day proration would be appropriate under our proposed cost/market rate formula, and if so, whether the restriction that the sum of the part-time rates for a 24-hour time period total no more than the maximum daily rate would also be appropriate.[151] We also sought comment on whether an entirely different method of calculating the maximum reasonable rate for part-time use would be more appropriate under the cost/market rate formula.[152]

2. *Discussion*

a. Accommodation of Requests for Part-Time Leased Access

62. As an initial matter, we affirm our current rule requiring cable operators to lease time in half-hour increments. We recognize that part-time leasing is not expressly required by the statute, that it may impose additional administrative and other costs on cable operators, and that it may pose the risk of capacity being under-used. As noted above, if cable operators are not adequately compensated for their capacity, it may constitute a violation of Section 612.[153] We also recognize, however, that the statute does not restrict leased access to full-time programming and that part-time programming currently represents a significant share of the leased access marketplace, thereby providing much of the competition and diversity of programming sources that Section 612 was intended to promote.[154] Therefore, rather than permit cable operators to exclude part-time leased access programming, we will permit cable operators to set reasonable limits on when and how part-time programming must be accommodated, as set forth below.

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[148] *Further Notice* at para. 124.

[149] *Id.*

[150] *Id.* at para. 125.

[151] *Id.* at para. 102.

[152] *Id.*

[153] *See* Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

[154] *See* Lorilei Comments at 13.

63. First, we affirm the holding in *TV-24 Sarasota* that a cable operator is not required to open an additional leased access channel if a programmer's request can be accommodated in a comparable time slot on an existing leased access channel.[155] We believe that the comparability of time slots can be determined by a number of objective factors, such as day of the week, time of day, and audience share.[156] We also adopt our tentative conclusion that a cable operator should not be required to make even a dark channel available for leased access, so long as the programmer's request can be accommodated in a comparable time slot on a programmed channel.[157]

64. In addition, we will extend *TV-24 Sarasota* to permit a cable operator to accommodate a part-time leased access request by offering the programmer a comparable time slot on a channel otherwise carrying non-leased access programming.[158] We believe that the above measures based on *TV-24 Sarasota* will promote the statutory objectives of competition and diversity by providing part-time programmers with a reasonable opportunity to obtain carriage, while protecting the operator, subscribers and existing programming services from unnecessary disruption. As we stated in the *Further Notice*, to require operators to disrupt existing programming when adequate and comparable capacity is available on an existing channel would be incompatible with the statutory objective to promote diversity in a manner consistent with the growth and development of cable systems.[159]

65. Furthermore, we conclude that cable operators should not be required to open an additional channel for use by part-time leased access programmers until existing part-time leased access channels are substantially filled with leased access programming. For these purposes, we will consider a channel to be "substantially filled" with leased access programming if leased access programming occupies 75% or more of its programming day. In other words, cable operators do not have to open a second channel for part-time use until the first part-time channel has at least 18 hours of programming every day. Likewise, a third channel for part-time use does

[155]Several commenters support the rule set forth in *TV-24 Sarasota*. *See* Cox Comments at 25; Comcast Comments at 21; Adelphia, et al. Comments at 25; Multimedia/Susquehanna Comments at 7; Viacom Comments at 13; Lifetime Comments at 11-12; Prime Radiant Comments at 9; E!, et al. Reply at 6.

[156]*But see* RK Production Comments at 12 ("there are no 'comparable' time periods").

[157]*See* Cox Comments at 26; Comcast Comments at 22.

[158]*See* RK Production Comments at 12-13 (it is not necessary to dislocate a full-time programmer in order to accommodate a part-time leased access request); Visual Media Comments at 9 (same as RK Production); Car TV Comments at 2 (placement on a well-established channel is preferable to placement on a newly-opened channel that is mostly dark).

[159]*Further Notice* at para. 124 (citing *TV-24 Sarasota*, 10 FCC Rcd at 3518). *See* Faith & Values Comments at 7 (the phrase "adequate and comparable capacity" should be broadly construed to minimize disruption to existing programming).

not have to be made available until the second channel has at least 18 hours of programming every day, and so on.

66. Consistent with our tentative conclusion in the *Further Notice*, we will provide an exception to this rule and require operators to open an additional channel for part-time leased access use if a programmer (or collective) agrees to provide programming for a minimum of eight contiguous hours every day for at least one year.[160] The programmer may select any eight-hour time period during the day, but the same eight hours must be used every day.[161] Therefore, even if an operator has an existing part-time leased access channel that is not substantially filled with leased access programming, the operator must open an additional part-time leased access channel if it cannot otherwise accommodate a programmer's request for a year-long eight-hour daily time slot. Once an operator has opened a vacant channel to accommodate such a request, our other leased access rules apply. If, however, the operator has accommodated such a request on a channel already carrying an existing full-time non-leased access programmer, the operator does not have to accommodate other part-time requests of less than eight hours on that channel until all other existing part-time leased access channels are substantially filled with leased access programming.

67. By its nature, part-time programming poses a risk that channel capacity will not be fully used, and the cable operator may therefore be undercompensated if it is only paid for the time programmed. We do not believe that we could assure that the operation, financial condition, or market development of cable systems would not be adversely affected were we to require cable operators to open additional channels for part-time programming without the limitations set forth above.[162] The possibility of adverse effect would be especially likely if several full-time programming services highly valued by subscribers were frequently disrupted by intermittent part-

[160] *See Further Notice* at para. 124. *See also* Cox Comments at 24-26 (eight-hour minimum for at least a one-year period should be required before an additional leased access channel must be opened); Comcast Comments at 20-22 (same as Cox); Daniels, et al. Comments at 22 (minimum lease term of one year should be required); Multimedia/Susquehanna Comments at 7 (minimum time commitment should be for at least eight hours a day); Adephia, et al. Comments at 25 (daily minimum time requirement should be for a certain number of days of the week and for a minimum number of weeks or months); Time Warner Reply at 20 (an eight-hour requirement for only one day a week would be unacceptable). *But see* Daniels, et al. Comments at 22 (minimum time commitment should be 12 hours a day); Access TV Comments at 8 (daily minimum should be 12 hours); TCI Comments at 34 (a daily minimum must be no lower than 18 hours); Adelphia, et al. Reply at 14 (minimum time requirement should also apply to the opening of the first part-time leased access channel); Visual Media Comments at 9 (eight-hour requirement should not be for every day).

[161] *But see* Daniels, et al. Comments at 22 (minimum time commitment should be between 11:00 am and 11:00 pm); Cox Comments at 25 (eight-hour time span should include prime time); Comcast Comments at 21 (same as Cox).

[162] *See* Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

time leased access use.[163] We believe that an exception for a year-long eight-hour daily time slot is reasonable because the length and regularity of the required time commitment does not pose similar risks.[164] As we stated in the *Further Notice*, "there may be circumstances in which substantially greater harm to subscribers, the operator, and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated."[165] If and when digital technology causes a dramatic increase in cable systems' available capacity, we may revisit the above conclusions.

68. Part-time programmers are permitted to seek access on a collective basis. If part-time programmers request an entire channel on a collective basis, the operator must provide the channel regardless of any unused capacity on part-time leased access channels because we would not consider that a request for part-time programming. Similarly, part-time programmers that individually cannot meet the year-long eight-hour daily time commitment may demand access as a group in order to satisfy the requirement.[166] Allowing collective requests will not impose any further burden on cable operators since the same request could have been made by an individual programmer.

69. To summarize, we will modify our rules regarding part-time leased access programming as follows. Cable operators may accommodate part-time leased access requests by

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[163]*See, e.g.*, C-SPAN Comments at 9 (describing how their networks have been "swiss cheesed" by part-time leased access programming); NCTA Reply at 21-22. A number of commenters argue that a full-time non-leased access programmer should never be displaced for part-time leased access usage. *See* Eternal Word Comments at 12-13; A&E, et al. Comments at 60; Outdoor Life, et al. Comments at 30-33; TCI Comments at 33-34; Encore Reply at 10; International Channel Reply at 8; Liberty Sports Reply at 7; A&E, et al. Reply at 11; NCTA Reply at 21-22; *See also* Faith & Values Comments at 7 (part-time leased access programmers should be required to lease a full-time channel if their requests would bump existing programmers). *But see* VIPNA Comments at 14 (until the set-aside is filled, operators should be required to open any channel designated for leased access); Lorilei Comments at 14 (when a part-time request cannot be accommodated within one hour of the time requested, the operator should be required to open a new leased access channel if the request is for at least a 13-week period).

[164]Access TV argues that the Commission should restrict the amount of repetitive programming that leased access programmers can provide during the minimum time required for opening an additional channel. Access TV Comments at 8. TCI argues that the Commission should generally require that leased access programming not be repeated more than twice in one week, and that each month at least 50% of the total programming offered must be non-repetitive. TCI Comments at 34-35. *See also* U S West Reply at 12 (supporting proposals of Access TV and TCI). We decline to restrict the amount of repetitive leased access programming. We agree with VIPNA that leased access programmers have an incentive to provide non-repetitive programming in order to maximize its appeal to subscribers. *See* VIPNA Reply at 4-5. In addition, we believe that there are potential leased access programmers (e.g., tourist channels) for which a certain amount of repetition is an important element of their service.

[165]*Further Notice* at para. 124.

[166]We believe at this time, however, that it would be unduly burdensome to require cable operators to maintain records identifying which programmers are denied access so that part-time programmers can more easily organize a collective demand for access. *But see* Visual Media Comments at 9 (proposing such a recordkeeping rule).

providing comparable time slots on non-leased access channels or on channels already being used for leased access on a part-time basis. Cable operators will not be required to make an additional channel available for part-time leased access use until all other part-time leased access channels have at least 18 hours of leased access programming every day. So long as an operator has at least one channel designated for part-time leased access use that is not substantially filled by part-time programmers, the operator will not be required to open another part-time channel even if comparable time slots are no longer available on the part-time channel that is only partially programmed. However, if a leased access programmer (or collective) agrees, at a minimum, to provide programming during the same eight-hour time slot every day for at least one year, an operator will be required to accommodate the request even if an existing part-time leased access channel is not substantially filled with leased access programming. We believe that this approach achieves the statutory objectives of competition and diversity of programming sources, while doing so in a manner consistent with the growth and development of cable systems.[167]

b. Maximum Part-Time Rates

70. Because we are not adopting the proposed cost/market rate formula, and because the formulas for tiered and a la carte full-time services that we are adopting are similar in kind to the existing approach for setting the maximum full-time leased access rate, we affirm our decision to require that cable operators prorate their maximum full-time rate when determining their maximum permitted part-time rate, and to allow operators to adjust part-time rates according to time-of-day pricing. As we stated in the *Reconsideration Order*, we believe that this approach accounts for marketplace realities by recognizing that different time slots have different value, furthers the statutory goal of promoting a diversity of programming sources, and promotes the full use of leased access channels by making non-prime time slots less expensive than prime-time slots, and therefore more attractive, to programmers. We will permit cable operators to recover any additional technical costs that are attributable to part-time leased access programming in accordance with the rules we adopt in Section II.K. below.

71. Various commenters argue that the Commission should also allow cable operators to impose a surcharge for part-time leased access use.[168] Specifically, some commenters argue that a surcharge would account for the likelihood of programming "gaps" and unused time on the channel, or, to the extent the operator continues to use the remainder of the channel, the damage

[167] *See* Communications Act § 612(a)(1), 47 U.S.C. § 532(a)(1).

[168] *See, e.g.*, TCI Comments at 32; Intermedia/Armstrong Reply at 14; U S West Comments at 10; Continental Comments at 29; Encore Comments at 8; Faith & Values Comments at 7; Liberty Sports Comments at 7. *See also* Penn. Cable Network Comments at 6 ("fragmentary use of a channel -- no matter how small -- severely discounts the value of the channel for optimum usage"); Daniels, et al. Comments at 21 and Time Warner Reply at 19 (the costs of dealing with many part-time programmers exceed those associated with one 24-hour programmer). *But see* WBGN-TV Comments at 3 (part-time rates should not be more than 15% higher than the adjusted full-time rate); CME, et al. Comments at 27 (part-time rates for a 24-hour period should not exceed the maximum reasonable rate).

to its full-time programming of being "swiss cheesed" by part-time programming.[169] Commenters also argue that our current rules do not account for the full impact of part-time programming on the value of the remaining channel time available to the operator.[170] Finally, some commenters submit that when cable operators are required to accommodate part-time leased access requests, the value of the remaining channel time decreases because: (a) a majority of cable programmers seek only full-time carriage on cable systems and have no interest in sharing channel space, (b) preemption of current programming results in subscriber confusion, and (c) leased access programming that is incompatible with existing programming can result in the loss of subscribers.[171]

72. We do not believe that application of a surcharge for part-time programming is appropriate. First, we believe that the current record contains insufficient evidence to support any particular surcharge. For example, TCI proposes that the Commission apply a 10% surcharge on part-time programmers for every hour in a day that is not programmed (e.g., if only one hour a day is programmed, the surcharge would be 230%).[172] TCI does not, however, indicate how it arrived at its 10% figure, and, more importantly, TCI's proposal would allow operators to recover more than the maximum rate for a full-time channel when a channel has more than 10 hours and less than 24 hours of programming per day. For example, because the surcharge for 14 hours of programming per day would be 100% (10% surcharge for each of the 10 non-programmed hours on the channel), an operator could charge the equivalent of 28 hours a day for the channel.

73. In addition, we believe that with time-of-day pricing and the conditions we have placed on the amount of part-time programming that must be accommodated, the financial impact of part-time programming on cable operators should be minimal, making any surcharge unnecessary to adequately compensate cable operators as required by Section 612. According to our rules, operators will not be required to open additional channels for part-time leased access

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[169] *See* Cox Comments at 22, 24 ("Part-time programmers' demands for distinct time slots almost invariably result in some 'gaps' in the programming day, time for which the cable operator receives no compensation."); Comcast Comments at 15-16 (it is axiomatic that businesses that are concerned about "vacancies" and unused inventory -- such as hotels and car rental agencies -- will charge higher rates for shorter leases). *See also* C-SPAN Comments at 9 (describing how its prime time programming has been "swiss cheesed" by leased access; on one system, two hours of its prime time programming were preempted for a real estate agency's "showcase of homes" program, and on another system its programming was bumped for a variety of commercial programming, including a local home shopping service).

[170] *See* TCI Comments at 30-32 (arguing that the current formula does not compensate operators for the value of the time used, or the costs incurred when existing programming is displaced by sporadic and potentially inconsistent or offensive programming); Intermedia/Armstrong Reply at 13 (same). *See also* NCTA Comments at 32 (part-time leased access rates must adequately compensate operators for the loss of their ability to program a full-time channel).

[171] *See* TCI Comments at 31; Intermedia/Armstrong Reply at 13.

[172] TCI Comments at 32. *See also* Intermedia/Armstrong Reply at 14 (supporting TCI's proposal).

use (unless the request is for a year-long eight-hour daily time slot that the operator cannot otherwise accommodate) until all other part-time leased access channels are substantially filled with leased access programming. Thus, potential disruption to full-time programming and the problem of unused channel capacity will be limited. Time-of day pricing should also encourage the full use of part-time leased access channels and thus limit unused capacity.

74. We reject several other proposals made by commenters. First, we reject Continental's proposal that the first part-time programmer must pay for the full value of the channel, with its ratable share decreasing as more part-time programmers are added.[173] In addition to virtually ensuring that the rate to the first part-time programmer would be so prohibitive that none ever appears, we believe that Continental overstates the impact on the value of the channel when the first part-time programmer obtains carriage.

75. We also reject the suggestion of several commenters that part-time programmers should pay for any dark portion of a leased access channel that is available for part-time programming after part-time channel capacity has been leased.[174] Such a requirement could significantly discourage the use of leased access by part-time programmers.[175] In addition, as described below, we will permit the resale of leased access capacity, which may result in channels being more fully leased.[176] Resale will relieve operators of the cost and administrative burden of dealing with part-time programmers on such channels, while potentially assisting part-time programmers in obtaining carriage.

76. Finally, we disagree with those commenters that propose that part-time leased access rates should be deregulated due to the existence of, or similarity to, commercial advertising.[177] Commercial advertisers on cable systems are able to obtain carriage only at the sufferance of the cable operator; leased access, by contrast, is designed to afford carriage to those programmers that the cable operator, for whatever reason, may choose not to carry on its

[173] Continental Comments at 29. *See also* U S West Comments at 10.

[174] *See* Liberty Sports Comments at 7; Faith & Values Comments at 7; Encore Comments at 8.

[175] *See, e.g.*, Buckeye Comments at 12 ("[M]uch of the successful leased access usage on our system involves part-time lessees rather than entities programming a full channel. . . . Thus far, we have been able to schedule such part-time use so as to satisfy programmers' desire to reach certain audiences while making efficient use of limited channel capacity.").

[176] *See* Section II.D.

[177] *See* Continental Comments at 27 (arguing that cable operators have no undue market power over advertising rates in markets where they face competition from local television broadcast stations and other video service providers); Intermedia/Armstrong Reply at 14 (same). *See also* Comcast Comments at 16-17; Access TV Comments at 6-7.

system.[178] Deregulation of part-time leased access rates would afford part-time programmers no protection at all against unreasonable rates, and we therefore decline to adopt the proposal.

D. Resale of Leased Access Time

1. Background

77. In the *Further Notice*, we asked whether persons unaffiliated with the operator should be allowed to lease programming time from the operator and then sell it for a profit to other unaffiliated persons.[179] We sought comment on whether this type of resale service would benefit programmers by reducing transaction costs or by offering alternative ways for programmers to package their services.[180] We expressed concern, however, that enabling resellers to charge unregulated rates for leased access time may conflict with the Commission's statutory mandate to establish maximum leased access rates.[181] We also asked whether an exception should apply for not-for-profit leased access programmers, if the Commission were to prohibit the resale of leased access time.[182]

2. Discussion

78. Consistent with our authority to establish reasonable terms and conditions for leased access use,[183] we find that it would be unreasonable for an operator to prohibit a leased access programmer from reselling leased access capacity to other persons unaffiliated with the operator.[184] We note, as an initial matter, that resale is not a foreign concept in the cable industry. The record indicates that companies such as Access TV already make a business out of reselling remnant time on cable systems.[185]

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[178] *See* Section II.A.

[179] *Further Notice* at para. 141.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Communications Act § 612(b)(4)(A)(ii), 47 U.S.C. § 532(b)(4)(A)(ii).

[184] In the leased access context, we assume that what we call "resale" will in fact more closely resemble an arrangement between a lessee and a sublessee than an actual "sale" of channel capacity because the entity leasing access from a cable operator does not actually "own" the channel capacity. We also reiterate our statement in the *Further Notice* that the sale of traditional advertising time by leased access programmers does not qualify as resale of leased access time. *See Further Notice* at para. 141.

[185] Access TV Comments at 1-3.

79. We conclude that resale of leased access capacity to persons unaffiliated with the operator should be permitted, subject to certain contractual conditions described below that a cable operator may reasonably impose, because we believe that resale can provide substantial benefits to leased access programmers without an adverse impact on cable operators.[186] In particular, we believe that small and part-time programmers could benefit from resale.[187] For instance, a reseller could bring together various part-time programmers to form a programming package for an entire channel.[188] This service would not only relieve operators of much of the cost and burden of dealing with a large number of small programmers,[189] but would be more efficient, since a reseller's business would be devoted to this goal while cable operators typically devote little or no staff to promoting leased access.[190] We believe that resale may prove to be a crucial mechanism by which part-time programmers are able to obtain carriage.[191]

80. We are not persuaded that resale poses the dangers raised by some commenters. First, we disagree with those commenters that argue that resellers will charge excessive rates,[192] or that the Commission would be violating its obligations under Section 612 if leased access programmers are permitted to purchase time from a reseller at higher rates than the maximum rate established by the Commission.[193] Unlike a cable operator that may use unused leased access capacity for its own programming, a reseller unaffiliated with a cable operator does not have the

[186] *See* ValueVision Reply at 31-33; Telemiami Comments at 24; Telemiami Reply at 25-26.

[187] *See, e.g.*, Blab TV Comments at 13-14; ValueVision Reply at 31-33; Telemiami Comments at 24; Telemiami Reply at 25-26.

[188] *See* ValueVision Reply at 32-33.

[189] *See* Telemiami Reply at 26; Prime Radiant Comments at 9.

[190] Telemiami Comments at 24.

[191] *See, e.g.*, ValueVision Reply at 31-33 (arguing that resale may be the only financially feasible means by which small unaffiliated programmers can acquire small increments of time). *But see* Faith & Values Comments at 7 (resale is unnecessary since operators are required to provide leased access in minimal time increments); Encore Comments at 8 n.3 (the requirement to lease access in minimal time increments obviates any need for resale).

[192] *See* NCTA Comments at 33 (resale would "force operators to give away channel capacity to middlemen, who can then turn around and profit on the use of that capacity"); Daniels, et al. Comments at 24 ("[r]esale will only invite profiteering by unnecessary middle men which will certainly increase leased access rates"); TCI Comments at 38 (resale "will not promote diverse programming sources, but will promote profit taking by leased access users at the expense of the cable operator"); Visual Media Comments at 10 (resale would encourage speculative profiteering). *But see* Access TV Comments at 8-10 (resale of subsidized leased access capacity at below-market rates would unfairly disadvantage resellers of non-leased access capacity).

[193] *See* NCTA Comments at 33; Time Warner Reply at 17; Comcast Comments at 22-23; Cox Comments at 30-31; Adelphia, et al. Comments at 27-28; Adelphia, et al. Reply at 19.

incentive or ability to discourage leased access by charging unaffordable rates.[194] Because a reseller needs to attract leased access users, we believe that a payment exceeding our maximum rate will reflect the reasonable value added by the reseller.[195]

81. Second, we do not agree that resale would prevent cable operators from exercising their discretion under Section 612(c)(2) to consider "content to the minimum extent necessary to establish a reasonable price" for leased access.[196] NCTA and TCI argue that allowing resale would ensure that operators would not enter into contracts for rates lower than the maximum permitted by the Commission's rules.[197] For instance, NCTA contends that an operator "would be loathe to enter into an agreement with a non-profit organization for less than the maximum rate if that organization were able to then sell its rights to the channel to the highest bidder."[198] To avoid discouraging cable operators from providing carriage to not-for-profit entities and others at reduced rates, we find that it would be a reasonable term or condition of carriage for a cable operator to provide that if the lessee resells its capacity, the lessee must start paying the operator at a rate which may be up to and including the maximum permissible rate.[199]

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[194]*See* ValueVision Reply at 32 n.99 (resellers unaffiliated with cable operators would have little incentive to resell capacity at unaffordable rates). *See also* Asiavision Comments at 2 (resellers should be allowed to charge market rates).

[195]*But see* Comcast Comments at 22-23 (resale at rates above the maximum would eliminate the benefits intended for leased access programmers and would improperly subsidize resellers); Cox Comments at 30 (same as Comcast); Tele-Media of Delaware Comments at 15 (unregulated resale rates would defeat the purpose of a rate formula); CME, et al. Comments at 28-29 (by reselling limited leased access capacity at unregulated rates, resellers would be able to circumvent maximum leased access rates in violation of the Commission's mandate); Time Warner Reply at 18 (since the reseller's mark-up would be unregulated, the availability of leased access capacity at regulated rates would be unnecessarily decreased); Lorilei Comments at 16 (allowing a few resellers to control leased access capacity would block fair access for leased access programmers); U S West Comments at 13 (resale would "encourage brokering of prime leased access space and result in less choice for smaller programmers").

[196]Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2). *But see* TCI Comments at 38; NCTA Comments at 33; Daniels, et al. Comments at 24; Time Warner Reply at 18.

[197]NCTA Comments at 33; TCI Comments at 38.

[198]NCTA Comments at 33.

[199]As mentioned above, we asked in the *Further Notice* whether not-for-profit leased access programmers should be permitted to resell leased access capacity if the Commission otherwise prohibited resale. *See Further Notice* at para. 141. Because we permit resale generally, we need not consider whether a specific exception should be created for not-for-profit leased access programmers. We note that Visual Media opposed an exception for not-for-profit programmers. *See* Visual Media Comments at 10.

82. Third, we do not believe that resale would interfere with a cable operator's discretion to refuse to transmit programming containing obscenity or indecency.[200] The cable operator's right to refuse to transmit such programming applies to any leased access program or portion of a leased access program, regardless of whether the programmer purchased leased access capacity directly from the cable operator or through a reseller. Moreover, cable operators may provide in their leased access contracts that any sublessees are subject to the non-price terms and conditions that apply to the initial lessee.[201]

E. Tier and Channel Placement

1. Background

83. According to the legislative history of the 1992 amendments to Section 612, the purpose of leased access would be defeated if leased access programmers were placed on tiers that few subscribers access.[202] The 1992 Senate Report states that "[t]he FCC should ensure that [leased access] programmers are carried on channel locations that most subscribers actually use."[203] It further states that "it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers."[204]

84. In the *Further Notice*, the Commission tentatively concluded that leased access programmers are entitled to placement either on the BST or on the CPST with the highest subscriber penetration, unless technical or other compelling reasons weigh against such placement.[205] We reasoned that the BST and the CPST with the highest subscriber penetration qualify as "genuine outlets" because "most subscribers actually use" them.[206] We sought comment on whether the term "most subscribers" should be interpreted to mean that any CPST that has a subscriber penetration of more than 50% should also qualify as a "genuine outlet."[207]

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[200] TCI Comments at 38; Adelphia, et al. Reply at 19. *See* Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

[201] *But see* U S West Comments at 13 (a sublessee may be able to circumvent the terms and conditions that bind the lessee).

[202] 1992 Senate Report at 79.

[203] *Id.*

[204] *Id.*

[205] *Further Notice* at paras. 118-119.

[206] *Id.* at para. 119.

[207] *Id.*

2. *Discussion*

85. As stated in the *Further Notice*, we believe that we must ensure a "genuine outlet" for leased access programming in order to further the statutory goals of competition in the delivery of video programming sources and diversity of programming sources. To that end, we affirm our tentative conclusion that, absent a technical or other compelling reason,[208] leased access programmers have the right to demand access to a tier that most subscribers actually use.[209] Leased access programmers would not be assured access to most subscribers if cable operators were permitted to require leased access channels to be sold on an individual, or a la carte, basis.[210] As discussed above, the value of being carried on a tier is accounted for in the average implicit fee formula we are adopting for tiered services.[211]

86. Although we continue to believe that the BST and the CPST with the highest subscriber penetration qualify as genuine outlets,[212] we do not think it is necessary to restrict the placement of leased access programming to only those tiers. We believe that any tier with a subscriber penetration over 50% should also qualify as a genuine outlet because it consists of channel locations that "most subscribers actually use."[213] Therefore, if a leased access programmer requests placement on a tier, we will allow the cable operator the flexibility to place the programming on any tier that has a subscriber penetration of more than 50%. We believe that this approach takes into account the "legitimate need of the cable operator to market its product" because it allows the operator to consider the marketing mix of different tiers.[214] The record reflects that some commenters would favor placing leased access channels on a separate tier

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[208]For example, to ease technical burdens, a cable operator may place a leased access channel that it is required or permitted to scramble or trap out (such as channels that are devoted primarily to sexually-oriented programming) with other programming that is also scrambled or trapped out.

[209]*See* 1992 Senate Report at 79. *See also* Adelphia, et al. Comments at 24-25; Telemiami Comments at 23; CME, et al. Comments at 26; CME, et al. Reply at 22-23; ValueVision Reply at 29; WEVU-LP Comments at 2.

[210]*Further Notice* at para. 118. We therefore disagree with Daniels, et al. and Lifetime that cable operators should be permitted to force leased access programming onto channels that subscribers must purchase on an a la carte basis. *See* Daniels, et al. Comments at 20; Lifetime Comments at 10.

[211]*See* Section II.B.2.c.

[212]Adelphia, et al. Comments at 24; Game Show Network Comments at 22; Telemiami Comments at 23; ValueVision Comments at 23 (all supporting placement of leased access channels on the BST or CPST with the highest subscriber penetration).

[213]*But see* CME, et al. Comments at 26 (CPSTs should not qualify as genuine outlets unless they have a 90% or greater subscriber penetration).

[214]*See* 1992 Senate Report at 79.

comprised primarily, if not exclusively, of leased access programming.[215] We conclude that so long as such a tier has a subscriber penetration of more than 50%, the cable operator is not precluded from developing a tier that predominantly features leased access programming.

87. We disagree with commenters that argue that the Commission should not impose tier placement requirements since the Communications Act does not specifically require tier placement.[216] As described above, the legislative history supports a right to tier placement. Furthermore, the Communications Act authorizes the Commission to establish reasonable terms and conditions for leased access.[217] We believe that tier placement for leased access channels is a reasonable requirement that will promote the statutory goals of leased access by allowing leased access programming to reach the majority of subscribers of a cable system, in accordance with Congress' intent.

88. We therefore no longer believe that the issue of tier placement should be left solely to negotiation between the leased access programmer and the cable operator, as under our current rules.[218] That approach failed to account for the possibility that an operator might attempt to discourage leased access by placing leased access programming on unfavorable tiers if it competes with programming chosen by the operator. We disagree with commenters that argue that a right to tier placement provides leased access programmers with the benefits of tier placement without compensating the operator[219] and does not allow a cable operator to adjust the placement of programming for maximum subscriber appeal.[220] Cable operators are adequately compensated for the value associated with such tier placement under the maximum rate formula we are adopting,[221] and the tier placement requirements we are adopting afford cable operators sufficient flexibility to determine the placement of leased access programming for the greatest subscriber appeal.

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[215]Encore Comments at 6; ESPN Comments at 9; Liberty Sports Comments at 6.

[216]Daniels, et al. Comments at 19; NCTA Comments at 29; Rainbow Comments at 13; TCI Comments at 21-23; Travel Channel Comments at 22; Turner, et al. Comments at 10; Viacom Comments at 11; Time Warner Reply at 26-27.

[217]Communications Act § 612(c)(4)(A), 47 U.S.C. § 532(c)(4)(A). The legislative history of Section 612 states that the "FCC is given broad discretion in establishing the maximum reasonable rate and reasonable terms and conditions." 1992 Senate Report at 79.

[218]*Rate Order*, 8 FCC Rcd at 5939-5940. *But see* NCTA Reply at 16; Discovery Comments at 15; E!, et al. Comments at 7; Multimedia/Susquehanna Comments at 7; Turner, et al. Comments at 10; Outdoor Life, et al. Reply at 25.

[219]Daniels, et al. Comments at 20; Lifetime Comments at 11; TCI Comments at 24-25; Viacom Comments at 11-12; USA Networks Comments at 2-3.

[220]Time Warner Comments at 18; Turner, et al. Comments at 10; Viacom Comments at 11.

[221]*See* Section II.B.2.c.

89. With regard to specific channel placement, we believe that the cable operator should have the discretion to select the channel location of a leased access channel, so long as the operator's choice is reasonable.[222] Because a determination of reasonable channel placement will depend on the particular circumstances of a situation, we will evaluate these types of disputes on a case-by-case basis. We will take into consideration evidence that the operator deliberately interfered with potential viewership of the leased access programming in an effort to discourage continued carriage (e.g., by intentionally surrounding a leased access channel with dark channels or by frequently shifting its channel location without sufficient justification). We do not agree with Lorilei that an operator should be required to space leased access channels evenly throughout its system.[223] Once a cable operator has provided leased access programmers with a genuine outlet, we do not believe it is necessary to interfere with that operator's ability to structure channel line-ups. Therefore, although a leased access programmer may demand access to a tier that has a subscribership of more than 50%, the cable operator is entitled to place the leased access programming on any reasonable channel location on any qualifying tier.

F. Minority and Educational Programmers

1. Background

90. Pursuant to Section 612(i), a cable operator may substitute programming from a qualified minority or educational programming source for up to 33% of its designated leased access channels.[224] In the *Further Notice*, the Commission sought comment on whether leased access requirements regarding tier and channel placement should also apply to minority or educational programming that is used as a substitute for leased access programming.[225] The Commission tentatively concluded that minority or educational programming should not qualify as a substitute for leased access programming unless it is carried on the BST or on a CPST that qualifies as a genuine outlet.[226]

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[222] *But see* Game Show Network Comments at 19-21.

[223] Lorilei Comments at 9.

[224] Communications Act § 612(i), 47 U.S.C. § 532(i). Section 612(i)(2) defines a qualified minority programming source as one that "devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned, as the term 'minority' is defined in Section 309(i)(3)(C)(ii)" of the Communications Act. Communications Act § 612(i)(2), 47 U.S.C. § 532(i)(2). Section 309(i)(3)(C)(ii) identifies Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders as minority groups. Communications Act § 309(i)(3)(C)(ii), 47 U.S.C. § 309(i)(3)(C)(ii). Section 612(i)(3) defines a qualified educational programming source as one that "devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding $15,000,000." Communications Act § 612(i)(3), 47 U.S.C. § 532(i)(3).

[225] *Further Notice* at para. 132.

[226] *Id*

2. *Discussion*

91. Applying the same tier placement standard we are adopting for leased access, we conclude that minority or educational programming will not qualify as a substitute for leased access programming unless it is carried on a tier that has a subscriber penetration of more than 50%.[227] The cable operator may select which qualifying tier to use for the substituted programming. As we noted in the *Further Notice*, neither the statute nor the legislative history specifically requires that most subscribers receive the substituted minority or educational programming.[228] However, as we previously stated, the language of Section 612(i)(1) strongly suggests that Congress envisioned that any substituted minority or educational programming would be placed on the same channels that would have been used for leased access.[229] Specifically, Section 612(i)(1) states that "a cable operator required by this section to designate channel capacity for commercial use may use *any such channel capacity*" to provide minority or educational programming.[230] Furthermore, to allow a more lenient standard for minority or educational programming could potentially diminish its value as a substitute for leased access programming. We will therefore impose the same tier and channel placement requirements on substitute minority or educational programming as we do on leased access programming.

G. Preferential Access

1. *Background*

92. In the *Further Notice*, we asked whether preferential treatment for not-for-profit leased access programmers should be required "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[231] To determine whether current leased access rates restrict the diversity of programming sources, we asked that commenters provide specific and concrete examples illustrating the extent to which not-for-profit programmers can afford current leased access rates.[232] We sought comment on how to calculate preferential rates, if found

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[227] *See* Section II.E. *See also* CME, et al. Comments at 29-30; VIPNA Comments at 14-15. In response to comments by Lorilei and Prime Radiant opposing the establishment of special programming categories based on race or programming content, we note that Section 612(i) specifically allows minority or educational programming to serve as a substitute for leased access programming. *See* Lorilei Comments at 14; Prime Radiant Comments at 10.

[228] *Further Notice* at para. 132.

[229] *Id.*

[230] Communications Act § 612(i)(1), 47 U.S.C. § 532(i)(1) (emphasis added).

[231] *Further Notice* at paras. 111-112 (quoting Communications Act § 612(a), 47 U.S.C. § 532(a)).

[232] *Id.* at para. 112.

to be necessary.[233] We also asked whether cable operators should be required to give preferential access to not-for-profit programmers by setting aside a certain percentage of their leased access capacity for such use (e.g., 25%).[234] In addition, we sought comment on whether a "not-for-profit programmer" should be defined as a programmer with Section 501(c)(3) tax-exempt status.[235] Commenters were also invited to demonstrate with specific evidence why preferential treatment might be appropriate for certain types of for-profit programmers, such as low power television ("LPTV") stations and minority and educational programmers.[236]

2. Discussion

93. We do not believe that mandating preferential access or preferential rates for not-for-profit programmers is necessary or appropriate under Section 612. First, leased access is intended for "commercial use," which the Communications Act defines as "the provision of video programming, whether or not for profit."[237] The fact that not-for-profit leased access programmers are defined as commercial users for purposes of leased access indicates that they should compete on equal terms with for-profit leased access programmers.[238]

94. Second, we do not believe that requiring cable operators to offer preferential treatment to not-for-profit programmers is necessary to serve the statutory purposes of Section 612.[239] Mandatory preferential treatment would not necessarily promote diversity since unaffiliated not-for-profit programming sources are not inherently more diverse than unaffiliated for-profit programming sources.[240] In fact, mandatory preferential treatment could potentially conflict with the statutory directive that leased access rates not "adversely affect the operation,

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[233] *Id.* at para. 113.

[234] *Id.* at para. 114.

[235] *Id.* at para. 115 (citing Internal Revenue Code, 26 U.S.C. § 501(c)(3)).

[236] *Id.*

[237] Communications Act § 612(b)(5), 47 U.S.C. § 532(b)(5).

[238] *See, e.g.,* Outdoor Life, et al. Comments at 36; TCI Comments at 28; Liberty Sports Comments at 4; Time Warner Reply at 25-26; NCTA Reply at 15; Telemiami Comments at 16.

[239] *See* U S West Comments at 11; Outdoor Life, et al. Comments at 36.

[240] *See* Game Show Network Comments at 30; Outdoor Life, et al. Reply at 23; SCBA Reply at 5. *But see* CME, et al. Comments at 17 ("commercial programmers are far less likely to offer the sort of diverse, challenging material that Congress sought to cultivate when it created leased access"); CME, et al. Reply at 10 (diversity goal cannot be met if an entire category of programmers is excluded); HITN Comments at 18-19 (preferential treatment for not-for-profit leased access programmers would promote diversity and competition).

financial condition, or market development of the cable system"[241] because a mandatory preferential rate below what the Commission has determined to be the maximum reasonable rate may be insufficient to compensate operators for leased access use.

95. Third, although CME, et al. argue that the economic structure of not-for-profit programmers makes them "fundamentally incapable of competing with commercial entities for limited channel capacity,"[242] not-for-profit status does not necessarily indicate a lack of financial resources.[243] Outdoor Life, et al. note that many not-for-profit entities have annual incomes that far exceed those of most nascent programming networks.[244] Moreover, while we agree with CME, et al. that Congress gave cable operators the flexibility to negotiate lower rates,[245] we do not believe that operators' right to negotiate lower rates should be transformed into an obligation to provide affordable rates to not-for-profit leased access programmers.[246] CME, et al. cite legislative history which states that "by establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system."[247] Again, however, Congress' recognition that not-for-profit programmers might benefit if cable operators are able to offer discriminatory rates does not translate into a right to preferential treatment.[248]

96. In addition, we reject HITN's recommendation to require cable operators to set aside 33% of their leased access capacity, at nominal rates, for not-for-profit programmers that

[241]Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1). *See* Cox Comments at 27; Comcast Comments at 24; Game Show Network Comments at 30; Penn. Cable Network Comments at 6; ESPN Comments at 9; Adelphia, et al. Reply at 15-16.

[242]CME, et al. Comments at 16-17. *See also* Denver Area Ed. Reply at 13 ("by their very nature, non-profits are supposed to function outside the market").

[243]ESPN Comments at 9; NCTA Comments at 35; Time Warner Reply at 24-25.

[244]Outdoor Life, et al. Comments at 36 (stating, for example, that the National Rifle Association of America, Inc. is the 33rd largest not-for-profit organization in terms of annual income, with 1994 revenues of nearly $148 million). *See also* TCI Comments at 29 (the Howard Hughes Medical Institute, the largest not-for-profit organization, has a net worth of $8.2 billion and an annual income of $423 million); Summit Comments at 3 ("Any non-profit large enough to meaningfully program a channel seven days a week, full time, should be considered in the same light as its competitors for channel space.").

[245]CME, et al. Comments at 15-16. *See also* Assn. of Public TV/PBS Comments at 3-4.

[246]*See* Cox Comments at 28.

[247]CME, et al. Comments at 16 n.22 (citing 1984 House Report at 51).

[248]*See, e.g.*, Liberty Sports Comments at 4; Faith & Values Comments at 3; Encore Comments at 5; Cox Comments at 26-28; Adelphia, et al. Comments at 24-25.

qualify as minority or educational programmers under Section 612(i)(2) or (3).[249] Congress chose to encourage minority and educational programming by allowing it to be used as a substitute for leased access, regardless of its profit status.[250] HITN cites no evidence that Congress intended the Commission to create an additional mechanism to promote not-for-profit minority or educational programming through preferential rates and set-asides. We therefore decline to adopt HITN's proposal.

97. Furthermore, we disagree with Assn. of Public TV/PBS that there is a current need for preferential rates and set-asides for educational and community programming services that public television stations may wish to offer in addition to their primary over-the-air signals.[251] We also decline to adopt commenters' recommendation to require cable operators to provide preferential leased access treatment to LPTV stations.[252] Congress provided public television stations and LPTV stations the preferences it deemed necessary.[253]

[249]HITN Comments at 22. *See also* HITN Reply at 7-8 (not-for-profit leased access programmers will be denied meaningful access if forced to compete with for-profit leased access programmers). *See also* Communications Act § 612(i)(2) and (3), 47 U.S.C. § 532(i)(2) and (3). The definitions of qualifying minority and educational programmers are provided in Section II.F.

[250]*See* Communications Act § 612(i)(1), 47 U.S.C. § 532(i)(1).

[251]Assn. of Public TV/PBS Comments at 3-8.

[252]*See* CBA Comments at 10-11 (no preference should be given to not-for-profit leased access programmers, but cable operators should be required to set aside 25% of their leased access capacity for LPTV stations); Viking Comments at 2 (preferential leased access rates for LPTV stations would help mitigate the lack of must-carry status and would promote diversity); WBQP-LP Comments at 4-5 (LPTV stations, especially minority-owned LPTV stations, should pay a fixed rate of $0.05 a subscriber and receive first priority for leased access); Vacation Channel Comments at 3 (LPTV stations should pay a fixed rate of $0.10 per subscriber per month); Beach TV Comments at 2 (without preferences for LPTV stations, cable operators will protect their local markets by carrying leased access programmers that do not compete with them in advertising sales); BCB Broadcasting Comments at 1 (as licensees of the federal government, LPTV stations are required to act in the public interest); Island Broadcasting Comments at 2 (having effectively denied must-carry rights for LPTV stations, the Commission should take this opportunity to promote the survival of LPTV stations by giving them first preference for full-time leasing); WZBN TV-25 Comments at 2-3 (a monthly rate higher than $0.05 per subscriber would prevent most LPTV stations from obtaining leased access, due to their expenses beyond the creation of programming); WBGN-TV Comments at 2 (LPTV stations should receive a 50% discount on leased access rates and should get first consideration for leased access channels); South Central Reply at 7-8 (commenters have provided sufficient evidence in this proceeding to demonstrate that preferential leased access treatment for local LPTV stations is warranted).

[253]*See* Communications Act §§ 614(c), 615, 47 U.S.C. §§ 534(c), 535. *See also* Telemiami Comments at 16; Encore Comments at 5; Faith & Values Comments at 3 n.2; Daniels, et al. Reply at 8-9; Outdoor Life, et al. Comments at 36 n.13; Prime Radiant Comments at 9; NCTA Reply at 11; U S West Reply at 10-11; C-SPAN Reply at 4; Outdoor Life, et al. Reply at 23-24; Time Warner Reply at 21-22; SCBA Reply at 5.

H. Selection of Leased Access Programmers

1. Background

98. In the *Further Notice,* the Commission proposed rules to govern a cable operator's selection of leased access programmers.[254] We tentatively concluded that an operator should be required to select leased access programmers on a first-come, first-served basis as long as the operator's available leased access capacity is sufficient to accommodate all incoming requests.[255] We sought comment on whether an operator should be allowed to accept leased access programmers on any other basis if its system's available leased access capacity is insufficient to accommodate all pending requests.[256] Specifically, we noted that where demand for leased access channels exceeds the available supply, it may be appropriate to allow an operator to make content-neutral selections in order to avoid situations that could "adversely affect the operation, financial condition, or market development of the cable system."[257] We asked whether it would be appropriate, when two or more leased access programmers simultaneously demand the last available leased access space, to allow the cable operator to select a leased access programmer based on the amount of time requested (e.g., a full-time request versus a part-time request).[258] We also sought comment on whether operators should be permitted to base their selections on any content-neutral criteria other than the amount of time requested by the programmers.[259]

2. Discussion

99. We conclude that, so long as an operator's available leased access capacity is sufficient to satisfy the current demand for leased access, all leased access requests must be accommodated as expeditiously as possible, unless the operator refuses to transmit the programming because it contains obscenity or indecency.[260] We believe that such an approach is the most appropriate method of assuring that cable operators comply with Section 612(c)(2),

[254] *Further Notice* at paras. 127-29.

[255] *Id.* at para. 128.

[256] *Id.*

[257] *Id.* (quoting Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1)).

[258] *Id.* at para. 129.

[259] *Id.*

[260] *See* Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).